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In the
Supreme Court of the United States
October Term, 1996

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,
Petitioner,

vs.

CATHY FREESTONE, et al.,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE ANTI-POVERTY PROJECT OF THE EDWIN F. MANDEL LEGAL AID CLINIC OF THE UNIVERSITY OF CHICAGO LAW SCHOOL IN SUPPORT OF RESPONDENT

GARY H. PALM
Counsel of Record
6020 South University Avenue
Chicago, Illinois 60637-2786
(773) 702-9611

Attorney for Amicus Curiae,
The Anti-Poverty Project
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
In Support of Respondent

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INTEREST OF THE *AMICUS CURIAE*

Pursuant to Court Rule 37, *Amicus Curiae* respectfully submit this brief in support of Respondent's request that this Court affirm the Ninth Court decision that, by creating a private right of action, would uphold Congressional intent to confer upon mothers and children the right to prompt child support enforcement services. Consent to the filing of this brief has been granted by counsel for all parties and letters indicating such consent have been filed with the Clerk of this Court.

The Anti-Poverty Project of the Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School provides services to assist women and children in obtaining the appropriate governmental services to help them achieve their economic and personal goals. Almost all of our clients are single mothers who initially ask for help in obtaining child support enforcement services from the State of Illinois under Title IV-D. Many have been waiting years for Illinois' IV-D agency, the Illinois Department of Public Aid ("IDPA") to take the next step in their case. Some have waited up to five years without even receiving an initial interview. Few of our clients have received timely services. In *every* case that the Anti-Poverty Project has sought a written explanation, the IV-D agency has admitted to serious violations of federal regulations but has claimed that all that can be done is for the client to wait her turn in line. Our clients need recognition by this Court that they can enforce the federal time limits through §1983 actions in state and federal court.

The Anti-Poverty Project expects to seek enforcement of Title IV-D deadlines mostly in state courts. Usually the §1983 claims will be made in the child support proceeding itself. When IDPA misses deadlines in ordering blood tests or obtaining the father's pay records, for example, the Project may seek to use §1983 to have the Court order IDPA to obey federal regulations and use its contempt powers if necessary. When necessary, a separate state chancery action can be used to obtain prompt services for that individual. Because the Anti-Poverty Project has only one attorney, a part-time social worker and fourteen University of Chicago law students, it is not in the position to bring many class actions in federal court. Nonetheless, it is prepared to do so if the State agencies remain so inadequate. At present, the Project is the only program in the State of Illinois working to implement Title IV-D rights.

For most women, child support is needed to move from welfare to work. The Anti-Poverty Project helps each client develop her own employability plan, including needed government benefits for training and job placement. Our

clients often need help with day care, transportation costs, initial employment expenses and suitable clothing.[1] While some of these costs can be obtained from the government and private charities, many cannot. With the new two year limits on welfare grants in Illinois as recently passed by Congress in the Welfare Reform Act,[2] our clients cannot stay on AFDC waiting out the State's delays any longer. They need enforceable rights immediately to get their cases moving again so that they can get off welfare within the next two years.

SUMMARY OF ARGUMENT

Without §1983 remedies, mothers and their children will have no recourse to enforce their right to prompt child support enforcement. Congress and the President gave all American mothers[3] and children the right to obtain prompt child support enforcement services from the States. Congress specifically instructed the Secretary of Health and Human Services to adopt "standards establishing time limits" so that each case would proceed in a timely fashion. Each State's Governor agreed to obey these regulations when the Governor reviewed and approved the State Plan.

The U.S. Department of Health and Human Services has repeatedly found that Illinois[4] has been, and continues to be out of full compliance or even substantial compliance (75%) with many time limits since the mid-1980's, yet it has never penalized Illinois for its negligence. Mothers and children in Illinois should not be prevented by HHS' indifference to their plight from enforcing deadlines in their individual cases. Individual mothers and children must be able to use §1983 to enforce these deadlines and obtain services. After all, the State governments entered into a contract agreeing to meet these deadlines. If it cannot meet the deadlines, Illinois should turn the federal money over to other entities that can meet the deadlines or fire those who are responsible for the disaster and replace them with effective managers. Literally

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[1]The individual clients we referred to in this brief have given their consent to disclosing their names.

[2]The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 1996, 110 Stat. 2105 (1996).

[3]The overwhelming number of custodial parents are mothers and will be referred to interchangeably as "mothers", "custodial parents" or "IV-D recipients."

[4]This brief will frequently analyze the performance of the state of Illinois in complying with its IV-D requirements, as the State of Illinois has authored an *Amicus* brief representing the States. Moreover, it is also the State with which we have the most direct experience.

millions of mothers and children are suffering in poverty or near poverty. As these children become hungry three or more times a day, grow and need new clothes and have the other expenses of growing up in America, their mothers struggle alone to provide and the Government fails them. Fathers flaunt the system; states are more effective collecting from parking violations scofflaws than they are from deadbeat dads.

Illinois collects a mere $2.30 for every dollar spent on administrative expenditures, ranking 48th in collections out of 54 states and territories in 1993. It is no wonder the costs to the State in lost reimbursement of AFDC and the future costs of dependency on government benefits is staggering. Illinois manages to obtain reimbursement for AFDC expenditures in only 8.1% of AFDC cases. These financial costs would be greatly reduced if the States met their deadlines. The human costs are incalculable. With a two-year limit on AFDC and the failure of the State to enforce child support, Illinois AFDC recipients are scared and trapped. Even with entry-level jobs and day care subsidies, most will not be able to make it without child support. Child support collections are vital to meet the extra costs of work. Illinois pays an AFDC grant of $377 per month for a family of three. Savings are out of the question, as rent alone in Chicago is usually greater than $377. Congress and the Department of Health and Human Services required Illinois to obey time limits, and the States agreed. These time limits must be enforceable now in state and federal courts so that these mothers and children have a fair chance to obtain enough funds to get off welfare in two years.

Section 1983 is a necessary tool for enforcing the rights of mothers and children. Individuals can use §1983 rights to enforce the time limits and can do so without flooding federal courts. In Illinois, the Project's clients already are relying on §1983 in state court child support proceedings to move for the setting of scheduling orders to force Illinois to comply with the federal deadlines. The State's Attorney and the Illinois Department of Public Aid always object and move to withdraw. The State takes the absurd position that individuals cannot enforce these rights to prompt action but must instead drop out of the IV-D system entirely. This position vividly shows that the State has no intention of obeying the deadlines. (Most mothers do not want to lose the other IV-D services that are not available to private or legal aid attorneys, such as income tax refund intercepts, Federal and State Parent Locate Services and interstate enforcement.). So far, the trial judges have recognized the supremacy of §1983 and federal law. They have refused to allow Illinois to withdraw its

services and have ordered more vigorous action to make up for past delays that violated federal law. In other situations of delay in the state agency before a case gets to court, individuals need §1983 equitable or mandamus actions in state court to enforce the federal deadlines. Since the State takes the position that there are no administrative remedies, §1983 actions are the mothers' and children's only recourse. The Illinois statutes do permit a Request for a Written Explanation of why the delay should be acceptable and a conference with the Illinois Department of Public Aid. The State's Attorneys' Office refuses to attend the conference or respond to the Request for Explanation so that this process is usually ineffective. The State's Attorney further takes the position that there is no way to obtain state court review of the administrative delays under state law. Our only recourse to enforce these federal time limits in state court is §1983.

When Congress, the President and the Secretary of the Department of Health and Human Services adopted the Family Support Act and the regulations, they did so against the background of pre-existing §1983 decisions of this Court. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988). At the time the Act was adopted, it met all the §1983 construction canons used to determine whether a statute created rights enforceable under §1983. Title IV-D meets all the requirements set by every justice who has participated in the line of cases since Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, (1981). When Congress perceived that the Court strayed from §1983 jurisprudence in Suter v. Artist M., 112 S. Ct. 1360 (1992), it responded by passing the Suter override law. Improving Americas School's Act of 1994, Pub. L. 103-382, 108 Stat. 3518 (1994), codified at 42 U.S.C. § 1320(b)(13) (1994). This piece of legislation reaffirmed all prior Supreme Court interpretations and specifically rejected the exclusion of "State Plan" statutes from §1983 enforcement.

Moreover, §1983 was adopted for this precise situation when the States refused to obey federal law. At that time, it was the States' treatment of the freed slaves and the federal government's failure to intervene effectively to enforce their rights. In 1988, it was the failure of the States to enforce child support laws. The Child Support Enforcement Act of 1992, Pub. L. No. 102-537, 106 Stat. 3531 (1992), was adopted because of the failure of the States to protect a voiceless, voteless underclass of children in our society. In Monroe v. Pape, 365 U.S. 167, 180 (1961), this Court recognized the importance of §1983 when States fail to enforce their laws and federal laws because of

"prejudice, passion, neglect, intolerance or otherwise." Congress responded in 1988 to the breakdown in child support enforcement in the States by "turning federalism on its head" and transforming much of state family law into federal law. The passage of these laws and regulations was bipartisan and adopted by both the Republican and Democratic Administrations. Even under the dissent's position in Maine v. Thiboutout, 448 U.S. 1, 11 (1980) (Powell, J. dissenting), the Child Support Enforcement Act should be included in the "laws" enforceable under §1983 because it is akin to statutes enacted under the 14th Amendment.

The Act explicitly states that each state agency will comply with the time limits the HHS sets pursuant to Part 303 of 45 C.F.R.; however Illinois and other states miss the deadlines in nearly every case. It is common for mothers and their children to wait over five years without paternity being established, even though the State knows where the father lives and works. Delay is the enemy of the mothers and children and the friend of the reluctant fathers. Even though arrearages are occasionally levied against recalcitrant fathers, they can in no way compensate the children for the days and months of suffering they endured while they went without basic needs. Many, many children go through their whole childhood without any money being collected for their support, not even the minimum of $10.00 per month.

ARGUMENT

I. An Individual Enforceable Right Is Needed To Fulfill The Promise Of Title IV-D.

A. Congress was justified in creating a §1983 enforceable right in child support enforcement services.

The Court must affirm the Ninth Circuit's decision because individuals who are victims of delay in the child support enforcement programs would otherwise have no recourse. Freestone v. Cowan, 68 F. 3d 1141 (9th Cir. 1995). The current IV-D program victimizes its clients too often by disobeying federal deadlines. In its most recent audit, HHS determined that Illinois was not in substantial compliance in the areas of (1) establishment of paternity and support orders, and (2) review and adjustment of support orders. Further, HHS discovered that Illinois had no case management system, as required by 45 C.F.R. 302.15(a)(1) and 45 C.F.R. 303.2(c). Without a case management system, Illinois has no way of even knowing when deadlines expire. The Office of Child Support Enforcement, U.S. Department of Health and Human

Services, Report No. Il-95-PR/PM, Program Results Performance Measurements Audit, State of Illinois 2 (September 16, 1996).

Under Title IV-D all custodial parents, regardless of income, are entitled to representation in obtaining child support enforcement. While family law used to be the domain of the states, Title IV-D significantly altered the relationship between the states and the federal government. IV-D created a massive infusion of federal funds and federal control into state child support collection systems. Indeed, the state agencies created under Title IV-D are supposed to provide the child support enforcement services that used to be provided by private attorneys and legal aid lawyers. Thus, the child support enforcement program set up under Title IV-D is the largest legal aid service in the country. It is also the only legal service in the country permitted to operate in such an abysmal fashion.

From their very statement of the interests, the States' *Amici Curiae* have attempted to scare this court about the impact of the Freestone decision. The facts are far different from what the States present. Basically, Illinois in writing the States' *Amici Curiae* brief, would have this Court say that it may operate its IV-D program as it wishes, without regard to meeting the federal deadlines mandated by Congress, thereby rendering those time limits a dead letter. These deadlines were arrived at through the administrative process with significant input from the states. They reflect what would be good practice. Indeed, from the perspective of most practitioners familiar with the system, the current deadlines allow for far too much time.

Congress was justified in deciding that there needs to be a uniform system with standards applicable to each case because the law and processes in each state are very similar. Also, these deadlines are consistent with what should be expected of any lawyer representing a client (albeit generally long). Apparently, the States take the position that if they meet the deadlines in 75 percent of the cases, then they have done their job. But no private lawyer can say to his or her client, "Well, sure, I missed the deadline in your case, but I was in compliance with the deadlines in 75 percent of my cases, so you cannot sue me and recover for malpractice even though you I have failed." Worse, the fact is that the people who must suffer due to this unprofessional and ineffective conduct are children who live in poverty or will live in poverty if they do not receive child support from the absent parent.

Title IV-D and the time limit regulations set forth deadlines for each step of each case. For example, 45 C.F.R. §303.4 requires that "[w]ithin 90 calendar

days of locating the alleged father or non-custodial parent, regardless of whether paternity has been established, [the IV-D agency must] establish an order for support or complete service of process necessary to commence proceedings to establish a support order and, if necessary, paternity." The regulation clearly sets forth the time frame in which IV-D agencies must establish an order for support or complete service of process, yet this deadline is routinely missed. As a regular practice, the State's Attorney's Office of Cook County, Illinois[5] misses an overwhelming number of the deadlines.[6] This is not the way to run a law office. Effective attorneys do not violate established standards for minimal competence and performance. In any law office outside the sphere of IV-D agencies, such conduct would be grounds for dismissal or even malpractice liability.

When deadlines are missed, the child at issue is deprived three-fold: 1) he or she is deprived of the congressionally mandated right to know who his or her father is, 2) the child is deprived of the federally mandated legal services that the IV-D agency was to provide, and 3) the child is deprived of the financial assistance needed to provide for his or her needs. Our clients do not expect that in every case the states' efforts will be successful in obtaining child support, but they do expect the states to take each enforcement action with the mandatory deadlines set by the federal law.

A wide gulf exists between what the federal regulations require and what the Illinois IV-D agency actually does. This can best be understood by the example of Julie Rodriguez, who did not receive any child support enforcement for 13 years and no child support whatsoever either.

Seventeen years ago, Julie Rodriguez gave birth to a son, Richard. By December 1980, paternity had been established and a monthly child support order for $30 was entered. Shortly thereafter Richard's father ceased paying the order, and, true to form, the State's Attorney's Office took no steps to enforce it. An effective attorney would have acted when IDPA determined that the father was not paying his support obligations as required by 45 C.F.R. §303.6. Pursuant to §303.6, an effective attorney would have taken "any appropriate enforcement action . . . within no more than 30 calendar days"

[5]In many states, including Illinois, the State's Attorney's Office provides legal services to the IV-D agency.

[6]Office of Child Support Enforcement, U.S. Department of Health and Human Services, Report No. IL-95-PR/PM, Program Results/Performance Measurements Audit, State of Illinois 2 (September 16, 1996).

unless service of process was required. If service were required, an effective attorney would have taken an appropriate enforcement action "within no later than 60 calendar days." Instead, the State's Attorney's Office did nothing for 13 years. The State's Attorney's Office waited 158 times longer than the Federal Regulations permit. She repeatedly tried to contact her Assistant State's Attorney with no success.

When Ms. Rodriguez implored the State's Attorney's Office in 1995 to be effective advocates for her, the State's Attorney's Office again failed to perform competently in the most basic way by not communicating with her. Had an Assistant State's Attorney contacted her, the State's Attorney's Office would not have filed a second useless paternity action since paternity had already been established in 1980. An effective attorney would have "solicit[ed] necessary and relevant information from the custodial parent and other relevant sources and initiate[d] verification of information." 45 C.F.R. §303.2. An effective attorney would have done this either by interviewing Ms. Rodriguez and asking whether paternity had already been established, or actually checked the court records for the information. Instead, the State's Attorney's Office failed to do either and wasted court resources and precious time seeking to establish paternity - again.

The failure to communicate with the client is common with the State's Attorney's Office.[7] The Assistant State's Attorney handling the case often conducts the first interview with the client in the courtroom under oath before the judge, subject to cross-examination by the opposing party. An effective attorney would meet with her client privately, outside the courtroom, off the record, to secure the information necessary to advocate effectively for her client. Indeed, she would have prepared her client to testify. But that is not what the Assistant State's Attorney did here. Here, the Assistant State's Attorney learned, from the judge, for the first time, that paternity had already been established. Once the Assistant State's Attorney learned that paternity had been established and a support order was in place, she should have tried to enforce it. An effective attorney would have served the father's employer with a withholding order (45 C.F.R. §303.100), but that is not what the Assistant State's Attorney did here. Instead, the State's Attorney's Office failed to act at all and waited 15 years before taking any action.

[7]A Study of the Cook County State's Attorney's Child Support Enforcement Division, Chicago Council of Lawyers, October, 1995.

The Assistant State's Attorney also learned that the court had modified the $30 per month support order down to $15 per month in 1984. An effective attorney would have initiated a review of the support order to determine if it should be modified upwards given the father's employment. 45 C.F.R. §303.8. But that is not what the Assistant State's Attorney did here. The State's Attorney's Office still has not taken such action.

Conspicuously absent from this argument is precisely what the State's Attorney's Office did do over the course of the 13 years it failed to enforce child support payments for Ms. Rodriguez and Richard. That is because in Illinois, the State's Attorney's Office uses a "team approach" to child support enforcement. The State's Attorney's Office never knows at any point in time exactly which attorney is handling a case; under the team approach, a different attorney handles the case each time it requires legal action and no one Assistant State's Attorney has long term responsibility.

A professionally competent law firm or legal aid office would not operate in this fashion. When a mother calls to speak with her lawyer, the office knows who is working on her case. This is not what happens in the State's Attorney's Office. Indeed, many files have been lost in the State's Attorney's Office because no tracking system was in place until quite recently. The Assistant State's Attorneys do not know themselves whether the State's Attorney's Office will require them to appear in court on a particular day on behalf of a client they have never met and about whom they know nothing.

B. Illinois' Track Record Exemplifies The Need For A §1983 Remedy

Illinois' track record for child support enforcement collections is abysmal. Over the past decade, Illinois has perpetually violated 42 U.S.C. §602(27). From April 1, 1994 through March 31, 1995, the Department of Health and Human Services audited Illinois' Division of Child Support Enforcement (DCSE). Out of the 251 cases HHS originally selected to include in the audit, 25% were excluded for a variety of reasons (e.g., insufficient information, fathers who lived out of state, and fathers who were economically unable to meet the enforcement orders, and cases that DCSE failed to closed). HHS then looked only at those cases where DCSE possessed solid information, where clients were cooperative and fathers were financially able to make support payments. The results revealed that DCSE managed to establish Paternity and Support orders in only 71% of the cases. DCSE Audit at 1. HHS explained that this low efficiency rate reflected that DCSE failed to even attempt service

of process in many cases and refer numerous cases to the State's Attorney even after they located the father. Additionally, HHS found that Illinois was only able to meet the statutory requirements for review and adjustment of child support orders in a mere 64% of its cases. DCSE Audit at 1. Moreover, HHS determined that DSCE fails to keep the adequate records required to provide mothers and children efficient and effective service. DCSE Audit at 14. The audit also determined that Illinois maintained inadequate records for most cases and that DCSE's computer system was unable to track significant case events. These statistics indicate that severe systemic problems exist in Illinois' IV-D agency. Because Illinois fails to accomplish the most basic tasks necessary to put mothers and their children in position to receive child support payments, it only collects $2.30 for every $1 spent on the program. If Illinois managed to collect at the national average, it could expect to recover at least $100 million more in child support (as based on 1994 figures).

The results of HHS's audit indicate that the cases we see in the Mandel Legal Aid Clinic are anything but anomalies. In fact, Linda LaFine's case is a perfect example of HHS's findings. For over 14 years, Illinois' IV-D agency failed to collect a *single* child support payment for Mrs. LaFine and her children. The agency failed to take appropriate steps to enforce the child support order, lost tract of the absent parent on several occasions and subsequently failed to timely locate him, his assets, his employer or sources of income. Even more troubling is that the IV-D agency knew that the father had assets in excess of $100,000 and still failed, even when they had the father in court, to take the proper legal action necessary - whether by pursuing contempt proceedings, or simply opposing the granting of a continuance - to ensure that the child support order was enforced. But most troubling is that the IV-D agency maintains it has done nothing wrong and cannot be held accountable for anything that has occurred in Mrs. LaFine's case.

Burnadine Dunn's case represents yet another example of Illinois' poor efficiency rate for establishing paternity and support orders. Here, Illinois deprived a mother and child of child support payments for 4 years by needlessly dragging the case through the court system in an attempt to establish paternity. This action was completely unnecessary since Ms. Dunn was married to the child's father at the time of conception resulting in a presumption of paternity once the baby was born.

Then there is Petra Rivera's case. This case illustrates Illinois' failure to keep adequate records and communicate pertinent information to clients. In this

case, the father moved for a downward modification of the child support order. At that point he was already $2,007 in arrears to Ms. Rivera and owed the state $746. The court granted the father's request and entered an order below statutory guidelines. Ms. Rivera did not attend the modification hearing. Neither Illinois' IV-D agency nor the State's Attorney's Office notified Ms. Rivera that a modification hearing was scheduled or that she had a right to appeal the decision. During the past year and a half, the father of Ms. Rivera's children has been working off and on and Illinois has known when and where he was working. At no point has Illinois served the father to begin the withholding process.

Because Illinois has a poor computer system and is unable to track significant events, Ria Cloutier and her children lost child support payments when Illinois failed to pursue enforcement when Mr. Cloutier began receiving unemployment benefits. Worse yet, after repeated phone calls, all initiated by Ms. Cloutier to learn what she must do, if anything, to secure these payments, an individual in DCSE told Mrs. Cloutier that there was nothing they could do to enforce the order against Mr. Cloutier's unemployment insurance benefits. That was completely wrong information which reveals Illinois' deliberate indifference toward enforcing mothers' and children's right to child support enforcement. The State merely had to comply with 45 C.F.R. §303.7 to provide Mrs. Cloutier and her children with proper enforcement of the order.

The Project routinely sees these types of cases in our office because Illinois fails to require even minimum competence or professional responsibility from the lawyers it uses to pursue child support. Illinois, through its policies and practices, mismanages the legal resources at its disposal to the injury of the rights of children and their mothers by failing to meet federal deadlines.

II. Congress intended the requirements in Title IV-D and the corresponding regulations to create enforceable rights under all the opinions (majority and dissents) in the Maine v. Thiboutout line of cases .

A. Under the reasoning of all the Justices' opinions who have written on the subject of §1983, Title IV-D creates a right enforceable under §1983.

Examination of all the opinions, addressing which statutes are enforceable under §1983, including all dissents, shows that Title IV-D creates enforceable rights under every test this court has identified. Both the express language of

Title IV-D and the corresponding federal regulations, as well as the legislative history require recognition of a §1983 right under all the Justices' views. Congress' recent enactment of the "Suter Override Bill" underscores Congress' clear intent to create a §1983 right to the child support enforcement services included in Title IV-D. Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994), codified at 42 U.S.C. §1320(b)(13) (1994). The new Welfare Reform Act makes clear that full compliance with time limits for each individual is required, not just "substantial compliance", which was taken out of the statute. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996). Even under the dissent in Maine v. Thiboutout, Title IV-D is the type of statute that §1983 is intended to enforce because it remedies unequal, class-based lack of enforcement of child support laws in the states. Title IV-D meets the legislative purposes of §1983 found in Monroe v. Pape, 365 U.S. 167, 180 (1981). Title IV-D recognizes the civil right for women and children to obtain child support through state enforcement.

1. Under the reasoning of Justice Brennan's majority opinion in Wright, Title IV-D creates a §1983 cause of action.

In Wright v. Roanoke Redevelopment and Housing Auth., 479 U.S. 418 (1987), the Court elaborated the standards initially set in Pennhurst for determining when a cause of action lies for statutory violations. These standards have been followed by the majority in all subsequent cases until Suter. Even in Suter, Chief Justice Rehnquist reaffirmed these principles while adding another one for Spending Clause statutes. Suter v. Artist M., 112 S. Ct. 1360, 1366 (1992). The Court in Wright recognized only two exceptions when a §1983 right would be unavailable for enforcement of a federal statute: (1) when the statute did not create enforceable rights within the meaning of §1983. Wright, 479 U.S. at 423 (citing Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 19 (1980)); and (2) where " 'the remedial devices provided . . . are sufficiently comprehensive to demonstrate congressional intent to preclude the remedy of suits under §1983' " Id. at 424 (quoting Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n., 453 U.S. 1, 20 (1981). The first prong will be addressed in this part, and the second prong will be analyzed in the next section of this brief.

The Wright court went on to define an enforceable right by relying on Pennhurst to determine whether the statute provided mere findings or legislative

preferences (just a nudge in the preferred direction) or whether the provisions were meant to be mandatory for the intended beneficiaries. Wright, 479 U.S. at 422. In Wright, the Court found that the language of the Brooke Amendment regarding rent ceilings in public housing projects was mandatory and intended to benefit individual beneficiaries. Wright, 479 U.S. at 429-30. Specifically, the Court recognized that tenants would be charged as rent "no more and no less than 30% of their income." Id. at 429-30.

The Court also concluded that the language at issue was not "too vague and amorphous" to be judicially enforceable and binding. Id. at 431-32. The regulations provided that a "reasonable" amount of utilities was includable in rent. Since the regulations "specifically set out guidelines that the PHAs [state agents] were to follow in establishing utility allowances, and they require notice to tenants and an opportunity to comment on proposed allowances," the concept of reasonable utilities was "sufficiently specific and definite" so as to be judicially enforceable. Id. at 431-32. In the instant case, Title IV-D standards are likewise concrete and not "vague and unenforceable." Indeed, Title IV-D regulations are even more specific and enforceable than those in Wright. A judge has only to glance at a calendar to determine if a state agency has taken the required steps within the time limits specified. For example, the judge might have to determine whether the IV-D agency did "[w]ithin 90 calendar days of locating the alleged father, . . . establish an order for support or complete service of process necessary to commence proceedings to establish a support order . . . (or document unsuccessful attempts to serve process, in accordance with the State's guidelines defining diligent efforts . . . .)" 45 C.F.R. §303.4 (d). As the recent audit report found, Illinois' lack of the federally mandated case management system prevents Illinois from determining if it has even met deadlines like this.[9] The opinion in Wright places special emphasis on the presence of guidelines in the statutory scheme. Here, we do not have mere guidelines. Title IV-D contains specific, numerical deadlines.

2. Under the reasoning of Justice O'Connor's dissenting opinion in Wright, Title IV-D creates a §1983 cause of action.

Under Justice O'Connor's dissenting opinion in Wright, Title IV-D also would create a §1983 cause of action (Justice O'Connor's opinion was joined

[9]Office of Child Support Enforcement, U.S. Department of Health and Human Services, Report No. II-95-PR/PM, Program Results Performance Measurements Audit, State of Illinois 2 (September 16, 1996).

by Chief Justice Rehnquist, Justice Powell and Justice Scalia). Wright, 479 U.S. at 432 (O'Connor, J., dissenting). Justice O'Connor adopts the majority's test, but disagrees with its application. The dissenters look only to the legislative action and history to determine whether Congress meant to establish mandatory duties to individuals. Justice O'Connor's dissent centered around her position that " 'the key to the inquiry is the intent of the Legislature' " as distinguished from regulations adopted by the Secretary. Id. at 433 (quoting Sea Clammers, 453 U.S. at 13). Under this approach, the Court first examines the statutory language "to determine if it is 'phrased in terms of the persons benefited' " and is written "in mandatory rather than precatory terms." Id. (quoting Cannon v. University of Chicago, 441 U.S. 677, 692 n. 13 (1979)).

Title IV-D qualifies under Justice O'Connor's analysis in Wright. Section 652 of Title 42 of the United States Code lists the duties of the Secretary and is replete with mandatory language, prefacing each duty with the word "shall" and including mandatory language within the actual duties. Most notably, the Secretary "shall review and approve state plans;" 42 U.S.C. §652(a)(3); "shall evaluate the implementation of state programs. . . [and] conduct such audits of state programs . . . as may be necessary to ensure their conformity with the requirements of this part; 42 U.S.C. §652 (a)(4); and to ensure compliance with "[t]he standards required by subsection (a)(1) . . . shall include standards establishing time periods." 42 U.S.C. §652(h). Congress, in turn, required that the State plan "must provide that the state will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating absent parents, establishing paternity, obtaining support orders, and collecting support payments." 42. U.S.C. §654(13). Congress thus explicitly bound the Secretary to enforce state compliance with the Title IV-D and bound the states, after the "Suter Override Bill," to obey and enforce the tests made of the state plan. Justice O'Connor concluded that Congress did not create an enforceable §1983 right in the Brooke Amendment because the statutory language does not explicitly create a right to utilities in rent. Wright, 479 U.S. at 433-34. The dissenters believed that the legislative history showed that Congress considered and rejected a proposal to create an enforceable right to "reasonable utilities." Id. at 434.

In Wright, Justice O'Connor evinced the concern that "once it has been found that a statute creates some enforceable right, *any* regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplates such a

result." Id. at 438. Here, Congress clearly contemplates that mothers and children have rights to prompt child support enforcement services. Congress specifically required that state child support enforcement program standards "shall include standards establishing time limits governing the period or periods within which a state must accept and respond to requests . . . for actions in establishing and enforcing support orders, including requests to locate absent parents, establish paternity, and initiate proceedings to establish and collect child support awards. 42 U.S.C. §652(h). Here, unlike the situation in Wright, where Justice O'Connor determined it to be unclear whether utilities were included in rent, Congress laid out in detail the services that state agencies must perform in specified time periods. HHS regulations show that they have not been "unleashed from any connection to congressional intent," as Justice O'Connor determined to be the case in Wright. Wright, 479 U.S. at 438.

Thus, here, not only was Congress explicit as to which services IV-D recipients had rights to, but HHS regulations reiterated that same intent.

3. Under the reasoning of Justice Stevens' majority opinion in Golden State, Title IV-D creates a §1983 cause of action.

Writing for the majority in Golden State Transit v. City of Los Angeles, 493 U.S. 103 (1989), Justice Stevens applied the two-part test in Wright. (Also see Wright, 479 U.S. at 448-49; Golden State, 493 U.S. at 106). Justice Stevens noted that in determining whether a right exists, the Court has "asked whether the provision in question was 'intend[ed] to benefit' the putative plaintiff." Golden State, 493 U.S. at 106 (quoting Wright, 479 U.S. at 430). Justice Stevens relied on the same position in his dissent in Suter.

4. Under the reasoning of Justice Kennedy's dissenting opinion in Golden State, Title IV-D creates a §1983 cause of action.

Justice Kennedy concluded that the NLRA did not create a §1983 remedy because "the only wrong committed by the state or its local entities is misapprehending the precise location of the boundaries between state and federal power." Golden State, 493 U.S. at 114 (Kennedy, J., dissenting). In the instant case, Congress' language "secures" Title IV-D individual rights. Title IV-D gives custodial parents and children rights to child support enforcement from the state. The individual rights-creating language of the new Welfare Reform Act is especially illustrative, requiring that a state will provide child support enforcement services to "*each child*" already receiving certain

state services and "any other child" with an application on file. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105, §301(A) (1996). Further, §301(B) extends coverage to "the custodial parent of such a child." §301(B). Thus, any child and their custodial parent has a right to the state's child support enforcement services. Moreover, there is no preemption issue at stake here as had existed in Golden State. Title IV-D itself creates all the rights.

5. Under the reasoning of Justice Brennan's majority opinion in Wilder, Title IV-D creates a §1983 cause of action.

In writing for the majority in Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990), Justice Brennan applied the Wright test in holding that healthcare providers had a right, secured under §1983, to payments based on reasonable and adequate rates. Justice Brennan cites the provisions "establish[ment] [of] a system for reimbursement of providers" and its "phras[ing] in terms of benefiting healthcare providers" as support for his conclusion that there was "little doubt" that healthcare providers were the intended beneficiaries of the statutory scheme. Wilder, 496 U.S. at 510. Likewise, Title IV-D establishes a system for providing child support enforcement services to mothers and children and is phrased in terms clearly benefiting mothers and children.

6. Under the reasoning of Chief Justice Rehnquist's dissenting opinion in Wilder, Title IV-D creates a §1983 cause of action.

Writing for the dissent in Wilder, Chief Justice Rehnquist concluded that a §1983 remedy was not available under the Boren Amendment to the Medicaid Act. Wilder, 496 U.S. at 524 (Rehnquist, J., dissenting). In reaching his conclusion, the Chief Justice worked from the premise, as the Court had done in Wright, that "[f]or a §1983 remedy to lie, the language used by Congress must confer identifiable rights." Id. at 526. In finding that medical providers had not been conferred identifiable rights, the Chief Justice determined that the structural evidence (the provision at issue was the thirteenth listed requirement for in the State plan provision without clearly conferring any substantive rights on the providers) and the absence of "any express 'focus' on the providers [plaintiffs] as the beneficiary class" indicated that Congress had not intended to confer such rights to the class of providers. Id. at 527.

In Wilder, patients, not providers, were the intended beneficiaries of the Medicaid Act. Here, the statute is explicit that the intended beneficiary class

is mothers and children. In fact, the Authorization of Appropriations section, 42 U.S.C. §651, places "express focus" on mothers and children. Congress appropriated money "[f]or the purpose of enforcing support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such children are living, locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance will be available under this part to all children." 42 U.S.C. §651 (1996).

Congress' intent to vest in mothers and children the right to prompt child support enforcement services is even clearer given Congress' subsequent action. In 1988, dissatisfied with state performance, Congress enacted what later became 42 U.S.C. §652 (h), entitled "Prompt State response to requests for child support assistance." 42 U.S.C. §652(h) (1996). Under the provision, Congress required that the Secretary shall adopt "standards establishing time limits governing the period or periods within which a State must accept and respond to requests . . . for assistance in establishing and enforcing support orders, including requests to locate absent parents, establish paternity, and initiate proceedings to establish and collect child support awards." 42 U.S.C. §652(h) (1996). More recently, Congress has emphasized the individual nature of the rights conferred by removing provisions that separately dealt with IV-A and non IV-A beneficiaries and collapsing them into one provision. 42 U.S.C. §654(4), (6) (1995). Congress thus underscored that "each child" receiving aid under Title IV-A and "any other child" who has an application filed for him has a right to child support enforcement services. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (which replaces 42 U.S.C. §654(4)). Unlike the language in the Medicaid Act, Congress has expressed clearly that the intended beneficiaries of Title IV-D were mothers and children.

Chief Justice Rehnquist's indication that if all that was at issue was enforcement through §1983 of the process "set forth in the statute, he would allow §1983 to be used to enforce the process." In Wilder, the Medicaid Act left the *states* with discretion to develop a rate system. Wilder, 496 U.S. at 524. However, Chief Justice Rehnquist determined that under the majority's opinion, "every §1983 action hereafter brought by providers . . . will inevitably seek the substitution of a rate system preferred by the provider for the rate system chosen by the State." Id. "The court orders entered in such actions therefore will require the States to adopt reimbursement rate systems different from those Congress expressly required them to adopt . . ." Id. at 525.

Here, on the other hand, Congress did not delegate this authority to the states. The federal government retained control over the operation of state IV-D programs. In fact, dissatisfied with the states performance under more flexible standards, Congress instructed the Secretary to promulgate a system of absolute deadlines. Since Congress has chosen not to allocate its authority as it did in the Medicaid Act at issue in Wilder, the Chief Justice's concern that courts would be displacing congressionally enacted law with their own law is inapplicable. Rather, by enforcing the deadlines authorized by Congress and promulgated by the Secretary, the courts will be giving force to congressionally enacted law.

Moreover, Chief Justice Rehnquist concluded in Wilder that while the provider plaintiffs did not have a right to have anyone outside the state agency decide if they are receiving a reasonable rate, they may have a right to "bring a §1983 action to require that rates be set according to that process" that the federal government left to the states to develop. Id. at 527. Likewise, IV-D families merely claim that they have a right to the process that Title IV-D and the regulations create. IV-D families do not claim that they have a right to child support enforcement, which under the Chief Justice's analysis, the Wilder majority would hold here; rather, IV-D families are claiming that they have a right to the process of state provision of prompt child support enforcement services.

Finally, unlike the rights at issue in Wilder, denying a §1983 remedy would render Title IV-D and particularly 42 U.S.C. §652 (h) a "dead letter." In Wilder, the Chief Justice alluded to the "Secretary's oversight" as providing some relief. Id. at 528. In this case, the Secretary has never imposed a single sanction on a noncomplying state agency, despite a history of failure on the part of state child support enforcement programs. Moreover, in Wilder, as Chief Justice Rehnquist noted, the Boren Amendment changed the statutory scheme to "allow the States more latitude in establishing Medicaid reimbursement rates." Id. Here, Congress removed any latitude previously present in the statutory scheme by instructing the Secretary to create deadlines. 42 U.S.C. §652 (1996). To now refuse a §1983 remedy to IV-D beneficiaries would thus contradict clear congressional intent and render Title IV-D a "dead letter", leaving federal time limits without any power to enforce them.

7. Under the reasoning of Chief Justice Rehnquist's majority opinion in Suter, Title IV-D creates a §1983 cause of action.

In Suter, the majority ruled that the Adoption Assistance and Child Welfare Act (the "Adoption Act") did not create enforceable rights under §1983. Suter v. Artist M., 503 U.S. 347 (1992). The Court found that the Adoption Act only required the State to file a plan that sets forth the 16 listed features but did not require actual compliance with the plan. Id. at 357. In explaining why the Adoption Act does not require more than a proper written plan, Justice Rehnquist wrote that "[t]he regulations promulgated by the Secretary to enforce the Adoption Act do not evidence a view that §671(a) places any requirement for state receipt of federal funds other than the requirement that the State submit a plan to be approved by the Secretary . . . What is significant is that the regulations are not specific and do not provide notice to the States that failure to do anything other than submit a plan with the requisite features, to be approved by the Secretary, is a further condition on the receipt of funds from the Federal Government." Id. at 361-62.

Unlike the provisions in Suter which gave no guidance to measure "reasonable efforts", Title IV-D imposes specific, numerical deadlines on the states. Importantly, this direction to the secretary is in a different section of Title IV-D than the section setting out the State requirements. Title IV-D requires that States take specific steps in order to establish paternity and enforce child support. To obtain approval and ultimately federal funding, a State must not merely submit a State plan under IV-D, but must also agree to comply with Title IV-D and its corresponding regulations. 42 U.S.C. §652(13) provides: "A state plan must provide that the state will comply with such other requirements and standards as the Secretary determines to be necessary." In the contract annually entered into between each state and HHS, the Governor of each state must sign a statement again agreeing to comply with Title IV-D.[9] This certification appears on the signature page itself. Moreover, the requirement that the Governor certify compliance each fiscal year before release of federal funds underscores that Congress did not merely require states to make assurances that they would comply. Rather, States must actually comply on a continuing basis to receive federal funds. If compliance were just a goal and not a requirement, Congress would not have required annual

[9]PL 104-193 Section 402 (a) provides: "[T]he term 'eligible State' means, with respect to a fiscal year, a State that . . . has submitted to the Secretary a plan that the Secretary has found includes the following:
(2)-A certification by the chief executive officer of the State that, during the fiscal year, the State will operate a child support enforcement program under the State plan approved under part D."

certification.

Indeed, Petitioner's argument suggests that Title IV-D is too burdensome for anyone, including reluctant fathers, to really expect that Title IV-D provisions will be obeyed. The States argue that compliance is overly burdensome on state financial and legal resources. Such an argument is akin to proposing that public defenders and prosecutors in the criminal context should not be held to any level of professional responsibility because doing so would be financially burdensome on the state. Such an argument is disingenuous, especially in the case of Title IV-D. First, the problem is not inadequate funding or too many cases, but poor management. Some states do much better. Pennsylvania collects $9.09 for every dollar expended. Michigan collects $8.43, while Illinois collected $2.36 and Arizona collected only $1.79 per dollar expended. States may opt not to participate in Title IV-D, participation in Title IV-D is not mandatory. Petitioner's argument that States' rights would be in danger if the Court were to allow a §1983 right is misleading because the States can simply opt out of Title IV-D if they object to its terms. In truth, what Petitioner is actually arguing is that this Court should find that Title IV-D places no burdens whatsoever on state actors (especially managers at the State's Attorney's Offices and legal administrators in the IV-D agency).

B. The recent passage of the Suter Override Bill underscores Congress' intent to create enforceable rights to the services included in Title IV-D.

That Title IV-D's requirements are binding is particularly clear given Congress' recent enactment of what is commonly known as the "Suter override bill."[10] Under the Act, states cannot comply by simply submitting a plan with the correct boilerplate language. The terms of the Plan must be obeyed. It is as if the words (the "State plan. . . must provide that") were excised from the text of Title IV-D and the remaining language ("The State will comply with such other requirements and standards as the Secretary determine to be necessary. . .", 42 U.S.C. § 654 (13)) is enforced. The states knew that they were agreeing to obey federal regulations setting time limits, not just submitting a written statement in the Plan agreeing to comply.

The bill provides: "In an action brought to enforce a provision of the Social

[10]Improving America's Schools Act of 1994, Pub. L. No. 103-382, 102 Stat. 5518 (1994), codified in 42 U.S.C. §1320(b)(13) (1994).

Security Act, such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter but not applied in prior Supreme Court decisions respecting such enforceability . . ." Id.

Congressional history makes it clear that the Suter Amendment, 42 U.S.C. §1320 (a)(2), is designed to ensure that individuals who have been injured by a State's failure to comply with the federal mandates of the State plan titles of the Social Security Act are entitled to seek redress in the federal courts to the extent that they were able to prior to the decision in Suter. The House Committee reported that the Suter amendment is designed to achieve three results. It "(1) responds to the recent Supreme Court decision in Suter, which dramatically limited the ability of program beneficiaries to enforce the State plan titles of the Social Security Act; (2) preserves private causes of action as they existed before the Suter decision; and (3) reaffirms that the State plan titles of the Social Security Act impose binding obligations on participating States to comply with the requirements of the Act." See Conference Report on H.R. 11, 102nd Cong. 2nd Sess. 138 Cong. Rec. H. 12552 (October 5, 1992).

Even those who expressed reservations concerning the Suter amendment recognized that it allows intended beneficiaries of the Social Security Act to sue a State for its failure to provide the benefits that the plan promises and that the State agreed to fulfill in exchange for federal funds. For example, Representative Archer had reservations about the Act because of his understanding that the amendment would permit the right to sue if any State plan requirement is not actually met. See 102nd Cong. 2nd Sess., 138 Cong. Rec. H. 5950 (July 2, 1992). This Statement demonstrates that even those in Congress who expressed opposition to the Suter amendment understood that its intention was to permit beneficiaries of the Social Security Act a broader right than Suter would allow to sue participating states.

The majority of the courts that have addressed the issue have read the amendment to reject the Supreme Court's reasoning in Suter and to require courts to return to the pre-Suter approach when deciding whether to recognize a private cause of action to enforce provisions of the Social Security Act other than §671(a)(15). See Marisol A. v. Giuliani, 929 F. Supp. 662 (S.D.N.Y. 1996); Harris v. James, 883 F. Supp. 1511, 1520 (M.D. Ala. 1995); Jeanine

B. ex rel. Blondis v. Thompson, 877 F. Supp. 1268, 1285 (E.D. Wis. 1995). In Jeanine B., the Court explained what would appear to be the common understanding of the amendment's effect:

> the amendment overrules the general theory in Suter that the only private right of actions available under a statute requiring a state plan is an action against the state for not having that plan. Instead the previous tests in Wilder and Pennhurst apply to the question of whether or not the particulars of a state plan can be enforced by its intended beneficiaries.

Id. at 1283.

C. Title IV-D is enforceable under the Dissent in Maine v. Thiboutout.

In Maine v. Thiboutout, 448 U.S. 1, 19 (1980) (Powell, J., dissenting), Justice Powell dissented in an opinion in which then Justice Rehnquist joined, from the Court's conclusion that federal statutes other than civil rights statutes may be enforced under §1983. The opinion recognized that a major purpose of the Reconstruction Era Civil Rights Acts "was to involve the federal judiciary in the effort to exert federal control over state offices who refused to enforce the law." Id. at 33. Here, Congress reacted to the failure of the states to enforce their child support laws by passing Title IV-D and creating a massive federal/state program. Indeed, IV-D was adopted in response to a violation of equal rights of a class overwhelmingly composed of women and children. The class of men were the beneficiaries of unequal government enforcement of the laws. Title IV-D changed many state laws that unduly discriminated against mothers and children and in favor of reluctant fathers. (Indeed, some fathers even became proud "deadbeat dads" for evading collection efforts).

Later, Congress found the performance of the states to be inadequate and ordered the Secretary of the Department of Health and Human Services to adopt standards setting deadlines for performing various child support functions in each case. Congress acted because of state failures to enforce state family law in a prompt fashion. Justice Powell's reliance on Monroe v. Pape shows that even under his dissent in Maine, Title IV-D is enforceable under §1983. After all, Monroe found that §1983 was passed "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the fourteenth amendment might be denied by the state agencies." Monroe, 365

U.S., 167, 180 (1961). Title IV-D was passed for this very reason. Monroe also found that §1983 was adopted because state officials were *unable* or *unwilling* to enforce a state law.

D. Title IV-D focuses unmistakably on custodial parents and their children as beneficiaries of the federal funding.

First, there can be no doubt that Title IV-D is intended to benefit families with children. The first section of Title IV-D includes among its purposes for enactment "enforcing the support obligations owed by absent parents. . . and assuring that assistance in obtaining support will be available under this part to all children (whether or not eligible for [AFDC] for whom such assistance is requested" 42 U.S.C. §651.

Amici in support of the Petitioner (hereinafter "*Amici*") assert that children and custodial parents are not the "especial beneficiaries" of the services mandated under Title IV-D as required by the Wright-Wilder test for establishing "a right under federal law" enforceable under §1983.[11] This argument has been rejected by every Circuit which has considered the issue save one.[12] It is refuted by the statutory language, legislative history, the policy statements of the federal Office of Child Support Enforcement and a common sense view of the intended operation of Title IV-D.

Amici argue that Title IV-D is aimed at reduction and avoidance of welfare costs but then insist on the non-sequitur that children and their custodial parents cannot be intended to be benefitted thereby. However, recoupment of welfare benefits and avoidance of welfare enrollment can only be accomplished if children receive *effective* child support services. To achieve the goals of the Title IV-D, the Petitioner and her fellow state IV-D directors must produce actual results--the collection of child support. The Respondent class of custodial parents here have sued for timely services and are fully aware that support collections may not result in every case. However, neither the congressionally desired benefits to children who avoid the welfare system and who may be lifted out of poverty, nor reduction in welfare costs, can be achieved if Petitioner does not provide the timely services to each family as

[12]State's brief at 6-12; *Amicus* brief of the American Public Welfare Association et al. at 27 n. 70; DA's brief at 25-26. Petitioner does not make this argument.

[13]See Albiston v. Maine Comm'n of Human Services, 7 F.3d 258 (1st Cir. 1983); Howe v. Ellenbacker, 8 F.3d 1258 (8th Cir. 1993); Carelli v. Howser, 923 F.2d 1208 (6th Cir. 1991); and Freestone; but see Wehunt v. Ledbetter, 875 F.2d 1558 (11th Cir. 1989).

required by federal law.

The Secretary requires specific action in compliance with the deadlines at every critical step in providing child support services. For example, the first step is often the location of a noncustodial parent or putative father "*For all cases*... the IV-D agency *must* attempt to locate all absent parents or sources of income and/or assets when location is necessary to take necessary action. Under this standard the IV-D agency must [u]se the appropriate location sources. . ." 45 C.F.R. §303.3(b) (1996) (emphasis added). If location efforts are unsuccessful, the IV-D agency must "[r]epeat the location attempts. . . either quarterly or immediately upon receipt of new information." Id. "For all cases" is used in most of the 45 C.F.R., Part 303 regulations.

Delays and denials of services constitute violations of specific regulations, not dissatisfaction with timely support services which were unsuccessful. Petitioner cannot blame the noncustodial parent for the agency's repeated loss of files or its failure to act on new location information provided by a custodial parent to establish or enforce an order for support (45 C.F.R. §§303.4(d), 303.6(c)(2)); its failure to act when a wage withholding payment is not received (45 C.F.R. §§303.6(a) and (b)); its failure to attempt to effectuate a wage withholding order when obligated parent becomes delinquent (45 C.F.R. §§ 303.6(c), 303.100) or its failure to timely and accurately distribute support it has collected (45 C.F.R. §§ 303.32, 302.51). Petitioner has never contended that these were unusual or isolated errors and the record on summary judgment demonstrates that the Petitioner systematically deprived children of these services. See Freestone v. Cowan, 68 F. 3d 1141, 1144-45 (9th Cir. 1995).

Moreover, DCSE specifically rejected IV-D agency assertions that they should not be held to specific tasks and time limits and determined that the requirements are realistic and necessary for the states to achieve. DCSE stated:

> Given the extent of comments about how many different entities are involved in IV-D process, lack of adequate case management processes in many IV-D programs and delays in providing services, we believe that setting specific time frames for each step of the process will ensure States provide necessary services on a timely basis.

54 Fed. Reg. 32284, 32290 (Aug. 4, 1989).

The regulations are very clear that children would and should benefit from the services required of the IV-D agencies.

III. Recognition by this Court of a §1983 cause of action will not result in a flood of the federal courts.

The States *Amici* claim that recognition by the Court of a §1983 cause of action for child support enforcement will flood the federal courts. This is flatly untrue. State courts, not federal courts, will hear the lion's share of these §1983 suits. Furthermore, state courts themselves will not be flooded by recognition of a §1983 cause of action. At the time a §1983 violation arises, the parties will already be or will eventually be in state court on the underlying child support case. A §1983 suit can simply be consolidated into that core child support suit. The practical realities are such that the courts will not be overrun. Legal aid lawyers representing mothers have neither the money, time nor staff to contribute more than a trickle to court dockets. This Court's recognition of a §1983 action will give families hope and empower women to regain control of their lives. Indeed, there will need to be some class actions to correct systemic failures but there will be no flood of litigation.

A. IV-D federal enforcement is deficient on paper and a 'dead letter' in practice.

In practice, states have never been held to the funding conditions imposed by Title IV-D. No state has ever been penalized. Illinois, for example, is woefully out of compliance as recently as the audit that was just released in September, 1996 shows. In Suter, Chief Justice Rehnquist recognized that §1983 was important for private plaintiffs to keep statutory provisions from being rendered "a dead letter." Suter, 503 U.S. at 360-61.

Title IV-D is a "dead letter" that requires §1983 enforcement. Although HHS theoretically has the power to impose sanctions or reduce state funding, the Secretary has *never* seen fit to use its power despite extensive state violations. The audit/penalty provision allows states to pass in and out of substantial compliance without actually improving the operation of their IV-D programs, much less obtaining child support within the mandatory deadlines. There are no remedies whatsoever for individual custodial parents who have waited years to obtain child support enforcement services more quickly. Enforcement of Title IV-D rights is a "dead letter."

B. Illinois' record with HHS demonstrates the failure of Title IV-D.

Illinois' record is illustrative. Illinois has a record of repeated noncompliance throughout the past decade, without a single reduction in funding. Illinois

shows how the states fail to meet the requirements set by the federal government. The Department of Health and Human Services recently conducted an audit of the Illinois Division of Child Support Enforcement from April 1, 1994 through March 31, 1995. The audit first excluded about 25% of the cases that had problems (insufficient information, father's who lived out of state, and fathers who were economically unable to meet the enforcement orders). The audit then looked at only those cases where the Illinois' DCSE had solid information, cooperative clients, and fathers who were financially able to make support payments. The audit determined that Illinois' DCSE failed to establish paternity and support orders on time in 29% of these cases. The audit explained that this low efficiency rate reflected the failure of Illinois' DCSE to even attempt service of process in many cases and the failure to refer numerous cases to the State's Attorney even after the father was located. The audit also determined that Illinois' DCSE failed to meet the statutory requirements for review and adjustment of child support orders in 36% of the cases. Furthermore, the audit determined that inadequate records were maintained for most cases, and the computer system was unable to track significant case events.

Illinois for the States' *Amici* takes the position that it is not obligated to enforce federal child support deadlines on an individual basis. This is not surprising since Illinois has also opposed every effort to use state administrative or judicial remedies to enforce the federal time limits. At every effort in state courts and agencies, the Illinois Attorney General asserts there are no state-created remedies to enforce the federal deadlines.

In response to an avalanche of complaints, the Illinois Legislature established an administrative accountability process in which individuals have a right to discuss Illinois' failures in their individual cases and prospective actions to be taken in the future. But the Attorney General takes the position that these proceedings are only informational and not binding on the State. At most conferences the issue is the State's failure to meet federal deadlines, yet the Illinois Department of Public Aid refuses to discuss past failures and refuses to set deadlines to which it must adhere.

Without §1983, custodial parents cannot even obtain an explanation from the State's Attorney's Office about delays in their court cases. Although the State's Attorney is a contracting party receiving funds under IV-D and is defined as part of the Child Support Enforcement Unit which must provide an explanation upon the request of the custodial parent under Illinois law, the

Office refuses to do so. Also, it rebuffs requests that Assistant State's Attorneys appear at the conference which custodial parents can request when they do not receive a satisfactory explanation.

When mothers have turned to the state courts to force the State's Attorney's Office to attend these conferences, Illinois has escalated their stance from one of denial to active coercion. In court, the States' Attorney Office, who is under contract with Illinois to appear in court, moves to withdraw from the case. This is a blatant attempt by Illinois to deny its child support enforcement services to complaining mothers. Through this tactic, Illinois has placed mothers and children in an impossible position. If the mothers bend to the will of Illinois, they are unlikely to obtain child support anytime in the near future. If they continue to push for compliance, Illinois will remove the services which only Illinois can offer - services like interstate and locator services - services which are vital in many cases to obtaining child support. Fortunately, state courts have not allowed the State's Attorney's Office to withdraw from these cases.

C. Most §1983 litigants will turn to state, not federal courts to pursue their claims.

Since State courts have jurisdiction over official capacity actions for prospective relief, most §1983 cases will be brought in state, not federal, court. State courts have concurrent jurisdiction over suits brought under federal law. Maine v. Thiboutout, 448 U.S. 1, 3, n. 1 (1980); Martinez v. California, 444 U.S. 277, 283 n. 7 (1980). Further, state court must hear the same type of claims, Testa v. Katt, 330 U.S. 386, 393-94 (1947), and claims between similarly situated litigants, Howlett v. Rose, 496 U.S. 356, 380-81 (1990), as those suits under state and federal law that the state court does in fact entertain. State courts are thus obligated to entertain official-capacity suits for *prospective* injunctive relief. Will v. Michigan Dep't. of State Police, 491 U.S. 58, 71 n.10 (1989) (quoting Kentucky v. Graham, 473 U.S. 159, 167 n. 14 (1985)). Because the 11th Amendment does not apply to suits for prospective relief, state courts will have jurisdiction over these §1983 suits.

§1983 claims against state IV-D officials will most likely be consolidated with the core child support litigation already in state court. Since most child support cases end up in the state courts, there will be few "unattached" §1983 suits. Under the present structure, a mother has a continuing action against a father from the moment a paternity suit is filed in state court until that father's

child reaches the age of majority. The presiding judge will have the power to consolidate the §1983 suit into the paternity suit. Even if a §1983 violation occurs before a child support suit is filed, state courts can consolidate the §1983 action into the support suit when it eventually ends up in court. Though some individuals may choose to bring §1983 actions in federal court, where the defenses may be different from those available in state court, at this stage the Court need not decide the scope of any defenses. The only issue is whether a §1983 cause of action to available.

D. The remedies provided under IV-D are not sufficient to override

Contrary to Petitioner's argument, Seminole Tribe v. Florida does not prohibit Respondents from suing a state officer in her official capacity. The Seminole Tribe Court declared that a "carefully crafted and intricate remedial scheme" evidences a Congressional intent to maintain state sovereign immunity and foreclose Ex parte Young access to the courts. See also Ex Parte Young, 209 U.S. 123 (1988). Seminole Tribe, 116 S. Ct. 1114, 1132 (1996). The Court's opinion in Seminole Tribe is inapplicable because Title IV-D is devoid of any "remedial scheme" whatsoever accessible to the beneficiaries of IV-D.

Petitioner claims that the audit and penalty scheme in Title IV-D meets the "carefully crafted and intricate remedial scheme" standard announced in Seminole Tribe. In Seminole Tribe, the remedial scheme was carefully crafted to provide a remedy to the beneficiaries, the Indian tribes, to displace the remedies under §1983. Here, the beneficiaries, the mothers and children, have no remedy - the audit is initiated by the Secretary of HHS and evaluates overall substantial compliance, at the 75% level, and not performance on each individual case.

E. Title IV-D Does *Not* Provide a Comprehensive Enforcement Scheme Foreclosing a Right of Action under §1983.

A statutory remedial scheme that provides *no* remedy for the violation of rights created in favor of one of the statute's two express beneficiaries certainly can*not* be considered, by any stretch of reason, to be sufficiently comprehensive to foreclosure of §1983 actions. Nevertheless, Petitioner argues that the remedial scheme is "sufficiently comprehensive" so as to foreclose a cause of action under §1983, even though the scheme leaves the statute's express beneficiaries without any method, means or avenue for enforcing rights granted in mandatory terms under the plain language of the statute. However,

Petitioner's argument is both contrary to precedent and illogical.

The "sufficiently comprehensive remedial scheme" exception was established in Middlesex County Sewerage Auth. v. Nat'l. Sea Clammers Ass'n., 453 U.S. 1 (1981). However, the remedial scheme addressed in Sea Clammers consisted of elaborate enforcement provisions that included explicit civil and criminal penalties for violation of the statute and granted any interested party the ability to seek judicial review of any administrative determination. Sea Clammers, 435 U.S. at 13-14. In contrast, the limited remedial scheme provided by Title IV-D contains no such comprehensive or elaborate enforcement provisions from which a valid inference that Congress intended to foreclose §1983 actions can be drawn. Title IV-D provides no civil or criminal penalties for violation of its provisions or of the federal regulations promulgated under it. In truth, Title IV-D's limited remedial scheme provides only financial disincentives, up to a maximum 5% reduction in federal matching funds, to be levied by the Secretary of Health and Human Services to deter the continued violation of Title IV-D provisions. According to The *Amici Curiae* Brief of the State of Illinois, such financial penalties have never been levied against any of the several states (*Amici Curiae* Brief of the State of Illinois at footnote 8) even though the "actual child support collection rate nationally is only 18%." Petitioner's Brief on the Merits at 19. How can such a remedial scheme be construed as comprehensive or effective?

Since Sea Clammers, few statutes have been found to contain comprehensive enforcement schemes that preclude or foreclose an action under §1983. The "sufficiently comprehensive" exception to the general rule that plaintiffs may bring §1983 causes of action for violations of federal statutes has been viewed as a narrow one. Wright v. City of Roanoke Redevelopment and Housing Auth., 479 U.S. 418, 423-24 (1987). Since the Sea Clammers decision, only one other case -- Smith v. Robinson, 486 U.S. 992 (1984) -- has held that a statute itself provided a remedial scheme "sufficiently comprehensive" to foreclose an action under §1983. A distinguishing feature of these two remedial schemes found "sufficiently comprehensive" to preclude actions under §1983 is that both of these schemes included express private remedies that allow citizens to compel state action when the state violates the federal statutory requirements.

In Wright, the Court squarely rejected the argument that enforcement schemes are "sufficiently comprehensive" so as to foreclose §1983 actions, when those schemes provide solely for detailed audits and limited fiscal

penalties to deter violations of the statute and fail to include express private remedies or to specifically authorize parties to seek judicial review of administrative determinations. In Wright, the Court also rejected the argument that the existence of other possible state court remedies in favor of the plaintiff would bar §1983 causes of action. The Wright Court reasoned that the existence of a state court remedy is hardly a sufficient reason to bar an action under §1983, which was explicitly adopted for the purpose of enforcing federal rights. Wright, 479 U.S. at 429.

Further, the Court has repeatedly held that administrative enforcement schemes, such as the one included in Title IV-D must be presumed to parallel the private §1983 action, rather than occupy the same ground. In Rasodo v. Wyman, 397 U.S. 397 (1970), the Court held that the Secretary's authority to withhold funds does not preclude private actions to enforce individual rights under Title IV-D. The court stated, "[w]e are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program" Id. Finally, in Wright, 479 U.S. at 428 the Court held that the Secretary's authority to audit, enforce annual contributions contracts, and cut off federal funds are generalized powers that are insufficient to indicate a congressional intention to foreclose §1983 remedies.

CONCLUSION

For the reasons set forth in this brief, the Anti-Poverty Project of the Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School, as *Amicus Curiae*, requests this court to affirm the judgment of the Court of appeals.

Respectfully submitted,

GARY H. PALM
Counsel of Record
Attorney for Amicus Curiae,
The Anti-Poverty Project
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
In Support of Respondent

January 6, 1997

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

GRANT WOODS
ATTORNEY GENERAL

1275 WEST WASHINGTON, PHOENIX 85007-2926

MAIN PHONE: 542-5025
TELECOPIER: 542-4085

DIRECT LINE: 542-8302
FAX: 542-8308

October 8, 1996

Gary H. Palm
Edwin F. Mandel Clinic of
The University of Chicago Law School
6020 South University Avenue
Chicago, IL 60637-2786

Dear Mr. Palm:

Pursuant to your request, on behalf of the Petitioner in *Blessing v. Freestone*, No. 95-1441, I consent to the filing of an *amicus curiae* brief by The Edwin F. Mandel Legal Aid Clinic.

Sincerely,

Tim Delaney
Solicitor General

CTD:sl

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ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
ATTORNEYS AT LAW
177 POST STREET, SUITE 300
SAN FRANCISCO, CALIFORNIA 94108
(415) 421-7151
FAX (415) 362-8064

FRED H. ALTSHULER
MARSHA S. BERZON
STEPHEN P. BERZON
PETER D. NUSSBAUM
MICHAEL RUBIN
LOWELL FINLEY
JEFFREY B. DEMAIN
INDIRA TALWANI
DANIEL F. PURTELL
SCOTT A. KRONLAND
GRAHAM A. BOYD
MARY LYNNE WERLWAS

October 9, 1996

Gary Palm
Mandel Legal Aid Clinic of Chicago
6020 S. University Ave.
Chicago, IL 60637

Re: *Blessing v. Freestone*
U.S. Supreme Court No. 95-1441

Dear Gary:

This is to confirm that I consent to the filing of an amicus curiae brief by the Mandel Legal Aid Clinic of Chicago on behalf of respondents in the above-entitled matter.

Sincerely,

Marsha S. Berzon

MSB/jh

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